BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Supreme Court of the State of Illinois sought to be reviewed is reported in the Illinois Supreme Court reports as *People* v. *Lewis,* 375 Ill. 330, and is also shown in the record filed herein (R. 9-13).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended, 43 Stat. 937 28 U. S. C. A. Sec. 344 (b), and in accordance with the statements set forth in the accompanying petition for writ of certiorari under the heading of "Jurisdiction" (R. —) which statement is adopted as the statement on which jurisdiction of this Court is invoked in this brief in support of the petition for certiorari. The date of the final order of the Supreme Court of Illinois (denying rehearing) in this cause sought to be reviewed is February 12, 1941 (R. 14).

Statement of the Case.

The defendant, John W. Lewis, was indicted on May 31, 1938 by a grand jury of Cook County, Illinois. The indictment consists of two counts each charging murder and he was held without bail (R. 2-3).

Lewis was arraigned and pleaded to the indictment

> "Not guilty in manner and form as charged therein and of this he puts himself upon the country and the said People do the like" (R. 4).

The cause came on for trial on June 30, 1938, and the defendant waived trial by jury and consented that the cause might be tried before the judge as the trier of the facts.

The record of the trial shows:

> "Testimony heard in part. Age of the defendant thirty one years. Further testimony heard and the court hearing the arguments of counsel."

Ordered the cause continued till the next day. On the following day the court made its finding:

> "And the court being fully advised in the premises doth find the defendant guilty of manslaughter in manner and form as charged in the indictment"

And continued the cause till June 30, 1938 (R. 5).

On June 30, 1938, the court adjudged that,

> "The said defendant John W. Lewis is guilty of manslaughter in manner and form as charged in the indictment"

and sentenced the defendant to the Illinois State Penitentiary for a term of from one to 14 years for the crime of manslaughter (R. 5).

The record is silent as to any waiver by the prosecutor of the murder charge or of any intention of the State to rely upon any lesser crime that might exist within the charge of murder.

Nor does the record show any request by the defendant for any finding of a lesser crime than that of murder nor any cry for quarter on his part.

The cause was submitted to the trial judge upon the murder issue.

The only issue before the trial judge was guilty of murder or not guilty generally.

Writ of error was sued out upon the judgment of the Criminal Court of Cook County to the Supreme Court of Illinois for review.

Error was alleged upon the record that the finding and judgment of the Criminal Court of Cook County deprived

the defendant of his liberty without due process of law and of his right to have made known to him the nature and cause of the action against him and deprived of the right not to be compelled to give evidence against himself.

It was also assigned as error upon the record in the Supreme Court of Illinois that the finding and judgment in question were in violation of the Fourteenth Amendment of the Constitution of the United States in that they constitute a deprivation of the liberty of the defendant without due process of law; that the judgment did not respond to the issue and that the indictment was not such under either count as to sustain the finding and judgment of either court and no facts are alleged in the indictment and forming the issue upon which a finding and judgment of manslaughter could be based.

The Illinois Supreme Court affirmed the judgment of the Criminal Court and in its opinion denied the claims of the defendant that his constitutional rights under either the Constitution of the State of Illinois and that of the United States had been invaded and denied him by said finding and judgment so rendered.

The Supreme Court of Illinois which is the highest judicial tribunal of the State in which this case is cognizable denied a petition for rehearing of said cause on February 12, 1941.

Specification of Errors.

Petitioner assigns upon the record the following errors which he says the said Courts committed to his prejudice, and which he will urge in the event his petition for certiorari is allowed.

It was error to imprison defendant under the finding and judgment of the Criminal Court of Cook County, and the judgment of the Supreme Court in affirmance thereof, and such error has deprived defendant of due process of law in

violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

The finding by the trial court of guilty of manslaughter on a murder issue, was equivalent to a finding of not guilty generally, and the judgment of conviction upon that finding is void and defendant is now illegally imprisoned without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and the trial court erred in entering such judgment and the Supreme Court of Illinois erred in affirming said judgment.

The departure from the issue of murder, and conviction of manslaughter, caused defendant to be convicted of a crime the nature and cause of which was not given him as is required by the Fourteenth Amendment to the Constitution of the United States, and such action and affirmance thereof are error.

The trial court erred in departing from the issue by gratuitously finding defendant guilty of a crime for which he was not on trial and of which he had been given no notice of the cause or nature of the accusation and the Supreme Court of Illinois erred in affirming the judgment of the trial court thereby depriving defendant of the benefit of the due process provisions of the Constitution of the United States.

The classification of defendants who may be charged with crimes which have lesser crimes included in their framework, as persons who are not entitled to the protection of the due process provision of the Constitution, as to the right to be advised of the nature and cause of the accusation as to the lesser crime, is an unjust discrimination against such defendants, and the court erred in denying to defendant the right to such notice under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

The Questions Raised Are Substantial.

IT IS THE RIGHT OF A DEFENDANT TO TRY ANY CHARGE AGAINST HIM UPON THE VERY ISSUE FORMED BY THE INDICTMENT AND HIS PLEA OF NOT GUILTY THERETO; AND WHERE THE ISSUE IS MURDER THE FINDING OR VERDICT MUST BE EITHER GUILTY OR NOT GUILTY OF MURDER. THERE CAN BE NO GRATUITOUS DEPARTURE FROM THAT ISSUE BY THE COURT OR JURY.

WHERE THE ONLY ISSUE IS MURDER A FINDING OF GUILTY OF MANSLAUGHTER IS A FINDING OF NOT GUILTY OF MURDER AND THE DEFENDANT SHOULD BE DISCHARGED FROM CUSTODY AS NOT GUILTY OF MURDER,—THE ONLY ISSUE TRIED.

THE STATE HAS THE RIGHT TO FORM AND PRESENT AS MANY ISSUES OF LESSER CRIMES UPON THE SEPARATE PROVISIONS OF THE CRIMINAL CODE AS IT MAY WISH AND COMPEL THE DEFENDANT TO TRY ALL OF THEM AS LAID; BUT IT MAY NOT INDICT FOR A GREATER CRIME AND FORCE A DEFENDANT TO TRY A LESSER CRIME UNDER THAT INDICTMENT; THE DEFENDANT MAY BY WAY OF DEFENSE SHOW A LESSER CRIME AND HAVE THE JURY SO TOLD BUT WHEN HE DOES HE VOLUNTARILY SUBMITS TO BE CONVICTED OF THE LESSER CRIME. A DEFENDANT MAY IN EFFECT CONFESS A LESSER CRIME TO ESCAPE THE GREATER BUT THE STATE CANNOT FORCE SUCH ISSUE UPON HIM, BY ANY PRESUMPTION OR ARTIFICE—THE STATE MUST, UNDER THE CONSTITUTION, ADVISE THE DEFENDANT IN ADVANCE OF THE ISSUE TO BE TRIED.

The questions raised upon this record are substantial. The gap between the issue of murder and the sentence of manslaughter in this record cannot be bridged or justified by the gratuitous action of the trial judge.

Murder and manslaughter are two distinctive crimes defined in separate sections of the Criminal Code of Illinois and carrying separate punishments. The element of malice

aforethought and deliberation distinguish murder (Rev. Stat. of Illinois, Chap. 38, Homicide, Sec. 140-155).

Homicide, Chap. 38, Par. 358, Sec. 140, Murder:

"Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."

Murder—Chap. 38, Par. 360, Sec. 142, Punishment:

"Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court."

Manslaughter defined, Chap. 38, Par. 361, Sec. 143:

"Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspections."

Manslaughter—Chap. 38, Par. 363, Sec. 146, Punishment:

"Whoever is guilty of manslaughter shall be imprisoned in the penitentiary for from one to fourteen years (as amended by act approved July 6, 1927. L. 1927, p. 398)."

The rule that the charge of murder is inclusive of manslaughter only states what is apparent. But that fact does not change the fundamental principle that a defendant is entitled to know by a proper indictment with which of the two crimes he is being charged and upon which he is to be tried.

It is not the law in Illinois, or generally, that a prosecutor may create the issue of murder and then prosecute any lesser crime embraced therein as he may wish.

The true rule is that the defendant may create the issue of a lesser crime by putting in a defense which, if believed by the jury, would reduce the crime from the one charge to the lesser one and then have the jury so instructed.

But that defense is a virtual confession and plea of guilty of the lesser crime prompted by the desire rather to endure the certainty of punishment for the lesser crime than to hazard the chance of suffering that of the greater. That initiative lies with the defendant, not the State.

The State cannot force the defendant to accept an issue not tendered definitely in the indictment.

Neither the court, nor the prosecutor, nor the jury, may force the issue of a lesser crime upon a defendant simply for the reason they may believe that the greater was not proven and because they find the structure of a lesser crime in the evidence before them.

When a defendant accepts the issue of murder as charged in an indictment that is the only issue being tried, and neither the State nor its agencies can depart from it.

That such is the rule is shown by the decisions of the Supreme Court of Illinois.

In *People* v. *Lucas*, 244 Ill. 603, the indictment contained three counts, each for murder. Manslaughter was not charged. The defendant was convicted and given life imprisonment. On writ of error to the Supreme Court of

Illinois, Lucas complained as error that the trial court did not instruct the jury as to manslaughter. The court held:

> "No instruction having been asked by plaintiff in error the court had no right to assume that the plaintiff in error preferred to submit the case to the jury in such way that the jury would be compelled to find the defendants guilty of murder or not guilty. It was the right of plaintiff in error to submit that question to the jury and require the jury to pass on the question of his guilt or innocence of the crime of murder, and it was not the duty of the court to submit issues and questions to the jury in which the parties by their action said they did not desire passed upon."

In the case of *People* v. *Barkas*, 255 Ill. 516, a group of defendants were charged with the crime of murder and convicted of murder. On writ of error to the Supreme Court of Illinois, in passing upon the assigned errors, the court said:

> "Plaintiffs in error contend that if they are guilty of any crime at all they were guilty of no greater offense than that of manslaughter. This case was tried on the theory that if the defendants were guilty of any crime they were guilty of murder, and no instructions were offered by them as to the theory of the crime of manslaughter."

The court then quoted from the case of *People* v. *Lucas*, 244 Ill. 603 that:

> "It was the right of plaintiff in error to submit that question to the jury and require the jury to pass on the question of his guilt or innocence of the crime of murder."

In the case of *People* v. *Savant*, 301 Ill. 325, the indictment was for murder and the defendant was convicted and given the sentence of death. It was alleged as error that the court

had given the jury no instruction defining the crime of manslaughter. The court affirmed this death sentence and quoted from the case of *People* v. *Lucas,* 244 Ill. 603. The court also cited as authority the case of *Dunn* v. *People,* 109 Ill. 635.

In *People* v. *Funk,* 326 Ill. 57, the indictment was for robbery with a gun. The defense was alibi. The defendant was convicted of robbery with a gun and it was alleged as error that the trial court should have given a form of verdict to the jury by which defendant might have been found guilty of the lesser crime of robbery without a gun. The court there held:

> "It is not incumbent upon the court to so instruct the jury or to submit issues to the jury for which neither side asks. It was the privilege of the plaintiff in error to submit such a form of verdict if he desired to do so, not having done so, he cannot now complain."

We call attention to the case of *U. S.* v. *Wiltberger,* 18 U. S. 76, where the defendant was indicted under a United States Statute punishing crimes on water. Section 8 of that statute covered murder on the high seas and rivers, bays, etc.; Section 12 covered manslaughter on the high seas only. The defendant was indicted for manslaughter on the River Tigris in China, about 35 miles inland in fresh water.

The Court in an opinion by Chief Justice Marshall held the crimes of manslaughter and murder to be distinct crimes and the Court ordered the defendant discharged.

And may we respectfully suggest that the crime of manslaughter is as distinctive in law from murder as is robbery or any other crime. It may be related to it, but it is a distinct and different crime. It can be prosecuted under its own indictment, under its own issue and plea, and under which a defendant might defend by showing his crime to be of lesser degree and get convicted of the lesser crime;

and so on till lesser crimes run out. But every time it would be the defendant who hazarded his liberty and the State would not be the moving party.

When this record is examined it is seen that there is no suggestion upon the record that manslaughter was in contemplation in the trial of the cause. The court must be taken to have tried only the issue presented by the charge and the plea. To do otherwise is to put judicial records upon the plane of presumptions and probabilities and as said by Chief Justice Marshall in the above cited case of *U. S.* v. *Wiltberger,* 18 U. S. 76,

> "Probability is not a guide which a court in construing a penal statute can safely take."

and of course that is true as well of judicial records.

The legal effect of the court's finding was that defendant was not guilty as charged, not guilty of murder—the only issue before the court.

If the rule is good that a defendant is held to have tried a case of murder where he does not ask for quarter and does not ask to have the jury charged as to manslaughter, then the rule must be that where the record does not show that the defendant took the initiative nor that he asked for an instruction on the lesser crime the record must stand on the charge and plea as made, and that is the situation upon which this Court affirmed the death sentence in the case of *People* v. *Savant,* 301 Ill. 325, and life imprisonment in *People* v. *Lucas,* 244 Ill. 603.

In short there is nothing in this record that suggests manslaughter except the finding of the court—and that is a clear departure from the written record. This the court could only do by consent of the defendant and there is no such consent in the record.

But here we have a record in which neither the State yields or consents to reduce the grade of the crime nor the

defendant asks for quarter; but in which the court stamps its own unsolicited idea of justice upon the record. In this the court not only erred, but erred by stepping beyond the bounds of its jurisdiction to convict of a crime not in issue before it. The legal effect of its finding was to find the defendant not guilty as charged, upon which he was entitled to his liberty.

The criminal law is coded in the State of Illinois and there are no common law crimes in Illinois. In *People* v. *Corder,* 306 Ill. 264, the Supreme Court of Illinois, in dealing with an objection which would have been good at common law, affecting the indictment in that case said:

> "There is no such crime as a common law felony in Illinois. All felonies in Illinois are defined by and required to be prosecuted under the criminal code and every indictment for felony in Illinois is required to be construed in accordance with this code."

The statute provides that all trials for criminal offenses shall be conducted according to the cause of the common law except where the criminal code shall point out a different mode (Par. 736, Chap. 38, Rev. Stat. of Illinois.)

The criminal code defines murder as follows:

> "Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought either expressed or implied." (Rev. Stat. of Illinois, Chap. 38, Par. 358).

Manslaughter is defined as follows:

> "Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspection." (Rev. Stat. Illinois, Chap. 38, Par. 361.)

The two different types of manslaughter, Voluntary and Involuntary, are further classified and each is defined at length in separate paragraphs of the Illinois Criminal Code (Par. 362, 363), further detailing the circumstances under which those different forms of manslaughter may be committed.

Voluntary manslaughter is defined as follows (Ill. Rev. Stat., Chap. 38, Par. 362):

> "In cases of voluntary manslaughter, there must be a serious and provoking injury inflicted upon the person killing, sufficient to excite an irrestible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder."

Involuntary manslaughter is defined as follows (Ill. Rev. Stat., Chap. 38, Par. 363):

> "Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: Provided, always, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."

The crime of murder is punished by the Illinois Criminal Code either by death, life imprisonment, or a term not less than fourteen years in the penitentiary.

Manslaughter is punished by imprisonment in the penitentiary for from one to fourteen years (Ill. Rev. Stat., Chap. 38, Par. 360, 364), and both crimes are felonies under the code (Par. 585, Chap. 38, Rev. Stat. Ill.).

The statute requires indictments to be stated either in the terms of the statute or stated

> "so plainly that the nature of the offense may be easily understood by the jury" (Rev. Stat. of Illinois, Chap. 38, Par. 716).

The statute prescribes the form of commencement of the indictment and then states

> "(here insert the offense, and time and place of committing the same with reasonable certainty.)" (Rev. Stat. Ill., Chap. 38, Par. 716.)

Not only do the United States Constitution, and the Illinois Constitution provide that a defendant in a criminal case shall be informed of the nature and cause of the accusation against him but here the statute sets out the form and states that one of the requirements is that it shall be stated so plainly that it may be easily understood by the jury, and by the same token it serves as information to the defendant of the "nature and cause of the accusation" against him.

The indictment here is for plain murder. It is neither in the language of the statute defining the crime of manslaughter nor does it attempt to set out the circumstances or any of them so that the jury could easily understand that the defendant was on trial for the crime of manslaughter. Hence there was no attempt to inform the defendant of the nature and cause of an accusation of manslaughter, the crime of which he was convicted, a crime separate and distinct from the crime of murder, with which defendant was charged.

It is to the indictment to which a defendant looks for the

nature and cause of the accusation against him. Here there was none as to the statutory crime of manslaughter.

There is no longer any reason why persons charged with crimes that may have degrees or lesser crimes included in them should be discriminated against and held to have no right to claim the benefit of the constitutional guaranty of due process. The Criminal Code of Illinois makes the crime of murder and manslaughter two distinctive crimes with differing incidents which enables the prosecutor to prosecute them separately and the defendant should have the equal right to insist that his right to notice of the type of crime he is to defend should be observed and protected.

The failure here to observe defendant's rights deprived him of his constitutional guaranty and his imprisonment is therefore wholly illegal and the process void.

Even in civil cases the courts hold that a judgment is void when the trial court has based its judgment on issues not in the case (*Ames* v. *Holmes,* 190 Ill. 561; *Reynolds* v. *Stockton,* 140 U. S. 254.)

It is therefore respectfully suggested that the defendant was legally found not guilty by the trial court. That the liberty of defendant was thereby taken from him without due process of law and that the record is now such if defendant's contention be right the error can only be corrected by the United States Supreme Court under its appellate jurisdiction under the Constitution and laws of the United States.

The question here raised it is respectfully urged is a substantial one. It is not idle or frivolous. It is a grave question of the liberty of a citizen made to depend upon a question not found to have been passed upon by the Supreme Court of the United States directly as here raised; and a question which the Supreme Court of Illinois has decided upon a theory opposed to other decisions involving the same principle such as *People* v. *Savant,* 301 Ill. 325, and the

other cases cited above where the parties went to the jury on the charge of murder and the plea of not guilty and where the defendant has held bound by the record although he might, and he so wished, have pleaded a lesser crime as a defense and been bound by it, or had its benefit, with the consent or verdict of the jury.

Wherefore, it is respectfully suggested that the record is such that in the exercise of the discretion reposed in this Court the appeal prayed be allowed.

All of which is respectfully submitted.

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